IN THE

Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMERICAN CIVIL LIBERTIES UNION, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE*

JOSEPH B. ROBISON,
Attorney for
American Jewish Congress,
15 East 84th Street,
New York 28, New York.

MELVIN L. WULF,
Attorney for
American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York.

JACK GREENBERG,
Attorney for
NAACP Legal Defense and
Educational Fund, Inc.,
10 Columbus Circle,
New York 19, New York.

Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

PAGE

IN THE

Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEBLER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMERICAN CIVIL LIBERTIES UNION, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE*

Statement of the Case

This case arises under the Colorado Anti-Discrimination Act of 1957 (Colo. Rev. Stat. Ann. 1953 (1957 Supp.), Secs. 80-24-1 to 80-24-8). Section 80-24-6(1) and (2) of that law prohibits discrimination in employment on the basis of race, creed, color, national origin or ancestry.

Under Section 80-24-2(5), this provision is made applicable to "every other person employing six or more employees within the state."

In April, 1957, Marlon D. Green, a Negro, filed an application with respondent, Continental Air Lines, Inc., for employment as a pilot. Green was interviewed by respondent and required to fill out an application form that designated his race. In the succeeding months, a number of white applicants were hired as pilots but Green was not hired.

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission, petitioner herein, which administers the Anti-Discrimination Act. The Commission investigated the complaint, held a hearing and issued its decision holding that Green was fully qualified for the position he had applied for and that respondent had failed to hire him solely because of his race. It rejected a number of defenses raised by respondent, including its claim that the anti-discrimination statute could not be applied to its operations because of their interstate character.

Respondent appealed the Commission's decision to the State District Court. Thereafter, further proceedings were had on the issue of the interstate nature of respondent's operations. Ultimately, the Commission and respondent entered into a stipulation that respondent was engaged in interstate commerce and that the job that Green applied for involved interstate operations. Thereupon, the District Court issued its decision setting aside the Commission's order solely on the ground that, because respondent was engaged in the interstate transportation of passengers, the state Anti-Discrimination Act could not constitutionally

apply to its hiring of personnel. The Colorado Supreme Court affirmed, by a vote of four to three, holding "that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."

The Question to Which this Brief is Addressed

May a state statute prohibiting discrimination in employment because of race, religion or national origin be constitutionally applied to the employment practices of an interstate airline?

Interest of the *Amici*

The American Jewish Congress is an organization of American Jews established in part "to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere." It established its Commission on Law and Social Action in 1945, in part "to fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

The American Civil Liberties Union is a 42-year old, private, non-partisan organization engaged solely in the defense of the Bill of Rights. Its principal interests are freedom of speech and association, due process of law, and the equal protection of the laws.

The N. A. A. C. P. Legal Defense and Educational Fund, Inc. is an organization dedicated to the task of broadening

democracy and securing equal justice under the Constitution and laws of the United States. It seeks through legal redress to assure these rights to all Negroes.

Each of these organizations has in the past been actively engaged in combatting discrimination in employment based on race, religion or national origin. They are, therefore, deeply concerned by the decision of the court below which, if allowed to stand, would preclude application to a substantial and vital segment of the nation's economy of the many state and local fair employment laws that have operated effectively in this country for more than 17 years.

The parties to this proceeding have consented to the filing of this brief.

Summary of Argument

1. Application of the Colorado statute to respondent's operations is not barred by the doctrine of pre-emption because Congress has not indicated any intent to bar such application.

A. No agency of the Federal Government has moved to halt application to interstate transportation of the many state laws prohibiting employment discrimination or even of the older and more numerous laws against discrimination in transportation facilities. State fair employment laws have been widely applied to interstate commerce and interstate transportation.

B. The various federal statutes dealing with interstate transportation have not been applied to employment discrimination. Neither can it be said that the Congressional

plan of regulation is so comprehensive as to preclude state regulation of untouched areas. Finally, even if there is federal regulation of this area, it does not, by itself, preclude state regulation that serves the same policy.

II. The Colorado statute is not a burden on interstate carriers.

A. No showing has been made that carrier operations are encumbered by the anti-discrimination requirement. The 17 years of experience with fair employment laws shows that employers have operated freely and successfully under their terms.

B. There is no possibility of subjecting carriers to conflicting requirements where uniformity is necessary. The Constitution itself makes it impossible for any state to adopt a law requiring employment discrimination. Moreover, inconsistent regulation of employment practices would not create the kind of difficulty in operation that has been held decisive in the case of statutes affecting the actual operation of railroad trains and other transportation units.

III. If the Colorado statute does impose any burden on interstate carriers, it is a minimal burden and the national interest in its elimination is far outweighed by the state interest in the elimination of employment discrimination. The various state anti-bias laws deal with an evil known to have extensive harmful effects. They are a normal and successful exercise of the police power. No countervailing interest of the Federal Government requires the result reached below.

ARGUMENT

The United States Constitution does not bar application to an interstate airline of the Colorado statute prohibiting discrimination in employment on the basis of race, religion or national origin.

The question in this case is whether a state statute affecting an aspect of commerce among the states is rendered invalid because of a claimed inconsistency with the constitutional power of the Federal Government to regulate interstate commerce. The principles governing the determination of such questions were recently reviewed by this Court in *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960). It was there held that a municipality may regulate the health aspects of machinery on ships operating under a federal license in interstate commerce.

Reviewing earlier decisions, this Court described them as holding that, in the exercise of the police power, "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government" (362 U. S. at 442) and that "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action * * * or unduly burdensome on maritime activities or interstate commerce * * *" (*id.* at 443). This Court further said that a Congressional intent to pre-empt state regulation "is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state" (*ibid.*).

We submit that application of the Colorado fair employment law to respondent's operations is not barred by these principles.

I

Congress has not indicated an intent to bar state regulation of racial discrimination in employment by persons engaged in interstate commerce.

A. Congress has accepted state regulation of this area.

The argument that Congress has acted so as to bar state regulation of employment discrimination ignores the fact that state laws on this subject have been in force for many years and have regularly been applied to interstate carriers. No branch of the Federal Government has taken the position that those statutes invade an area occupied by federal regulation.

Since 1945, twenty-two states have adopted laws condemning discrimination in employment. Nineteen of these are in the form taken by the Colorado statute, that is, a prohibition of such discrimination with provisions for administrative rather than penal enforcement. The first such laws were adopted in New York and New Jersey in 1945.[1] Subsequent laws were adopted in Massachusetts in 1946,[2] Connecticut in 1947,[3] New Mexico, Oregon, Rhode Island and Washington in 1949,[4] Michigan, Minnesota and Penn-

1. *N. Y.* Exec. Law Secs. 290-301 (1951); *N. J.* Rev. Stat. Secs. 18:25-1 to 18:25-28 (Supp. 1958).

2. *Mass.* Ann. Laws, Ch. 151B, Secs. 1 to 10 (Supp. 1958).

3. *Conn.* Gen. Stat. Secs. 31-122 to 31-128 (1958), as amended, Pub. Act No. 145 (1959).

4. *N. M.* Stat. Ann. Secs. 59-4-1 to 59-4-14 (Supp. 1957), as amended by L. 1959, C. 296; *Ore.* Rev. Stat. 659.010 to 659.115 (Supp. 1957), 659.990 as amended by L. 1959, C. 584; *R. I.* Gen. Laws Ann. Secs. 28-5-1 to 28-5-39 (Supp. 1958); *Wash.* Rev. Code Secs. 49.60.010 to 49.60.310 (Supp. 1957), as amended by L. 1959, C. 58.

sylvania in 1955,[5] Colorado and Wisconsin in 1957,[6] California and Ohio in 1959[7] and Illinois, Kansas and Missouri in 1961.[8] Alaska adopted such a law in 1953 when it was still a territory.[9] In addition, Delaware in 1960 and Idaho in 1961 adopted fair employment laws containing penal rather than administrative sanctions.[10] Finally, Indiana, in 1945, adopted a law condemning employment discrimination but containing no enforcement provisions.[11] Fair employment ordinances have also been adopted by a number of cities, most of them in states that subsequently enacted statewide legislation.[12]

The constitutionality of these statutes as applied to employers generally has never been seriously contested. That

---

5. *Mich.* Stat. Ann., Secs. 17.458(1) to 17.458(11); *Minn.* Stat. Ann. Secs. 363.01 to 363.13 (Supp. 1958); *Pa.* Stat. Ann. Tit. 43, Secs. 951 to 963 (Supp. 1958).

6. *Colo.* Rev. Stat. Secs. 80-24-1 to 80-24-8 (Supp. 1957); *Wis.* Stat. Ann. Secs. 111.31 to 111.37 (Supp. 1959), as amended by L. 1959, C. 149.

7. *Cal.* Labor Code, Secs. 1410 to 1432, West's Ann. Code (1961 Cum. Supp.); *Ohio* Rev. Code, Secs. 4112.01 to 4112.08, 4112.99.

8. *Ill.* Smith-Hurd Ann. Stat., ch. 48, Secs. 851-866; *Kan.* Gen. Stat. Ann. 1949 (1957 Supp.), Secs. 44-1001 to 44-1008; *Mo.* Ann. Stat. (Vernon Cum. Supps. 1960-1961), Secs. 296.010 to 296.070, 213.010 to 213.030.

9. *Alaska* Comp. Laws Ann., Secs. 43-5-1 to 43-5-10 (Supp. 1957).

10. *Del.* Code Ann. (1960 Supp.), Ch. 7, Sub-ch. 2, Secs. 710 to 713; *Idaho* Gen. L. Ann. (1961 Supp.), Ch. 73, Secs. 18-7301 to 18-7303.

11. *Ind.* Ann. Stat. (Burn's 1961 Supp.), Secs. 40-2307 to 40-2317.

12. See Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 Yale L. J. 431 (1947); *The New Pittsburgh Fair Employment Practices Ordinance*, 14 U. Pitt. L. Rev. 604, 606-09 (1953).

is no doubt due in large part to this Court's 1945 decision in *Railway Mail Association* v. *Corsi*, 326 U. S. 88, upholding the validity of an earlier New York state law prohibiting discrimination by labor unions. It is understandable that writers on this subject generally agree that fair employment legislation is constitutional. Waite, *Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 Minn. L. Rev. 349 (1948); *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 Yale L. J. 837, 846-8 (1947); 14 U. Pitt., L. Rev., *supra*, note 12, at 609-11; *Pennsylvania Fair Employment Practice Act*, 17 U. Pitt. L. Rev. 438, 442-4 (1956); *Employment Discrimination*, 5 R. R. L. R. 569, 572-575 (1960).

None of these laws contains any exemption for employers engaged in interstate commerce. They apply to "employers" generally. Exemptions are limited to employers of less than a specified number of employees and religious or other non-profit or distinctly private organizations. The various enforcement agencies have administered the laws without regard to whether the employers involved were engaged in interstate commerce. In addition, the laws have been widely applied to interstate carriers and only rarely has the issue of federal pre-emption been raised.[13]

13. In a few cases, the issue of pre-emption was raised before an enforcing agency but was not pressed. Aside from the present case, the only proceeding we know of in which the issue was raised in court is *Atchison, Topeka & Santa Fe R. Co.* v. *Fair Employment Practice Commission of the State of California*, 7 R. R. L. R. 164 (Los Angeles County, Superior Court, decided January 30, 1962). In that case, the State Commission had issued an order directing a railway company to cease discriminating against an em-

In the preparation of this brief, information on this point was sought from the state agencies charged with enforcement of the various state fair employment laws. Responses were received from eleven states, two of which, Indiana and Missouri, reported that they had handled no cases involving interstate carriers. The third, in California, reported only the case described in note 13 above. The following information was received from the remaining eight states.

The Kansas Commission on Civil Rights, since the adoption of the state law in 1961, has docketed one complaint against an interstate rail carrier. The railroad did not challenge the Commission's jurisdiction.[14]

The Massachusetts Commission Against Discrimination has prosecuted 92 complaints against seven interstate railroad companies, 18 complaints against 16 interstate trucking companies, and 12 complaints against nine interstate and international air lines.[15]

The Michigan Fair Employment Practices Commission has entertained complaints against an interstate bus company, an interstate railroad and Northwest Air Lines. The Northwest Air Lines complaint is docketed as Claim 598

---

ployee on the basis of race. The Superior Court set aside the Commission's order on the ground that it was not supported by the evidence. However, it first rejected the railway's contention that the Act could not constitutionally be applied to its operations. 7 R. R. L. R. at 165-166.

14. Letter of January 2, 1963 from Carl W. Glatt, Executive Director, Commission on Civil Rights. The letter also noted that, "In the eight years prior to July 1, 1961, under the unenforcible 1953 Kansas Act Against Discrimination, the Commission docketed three formal complaints against interstate carriers, all railroads."

15. Letter of December 27, 1962 from Walter H. Nolan, Executive Secretary, Massachusetts Commission Against Discrimination.

in the Commission's files. Northwest did not raise any question over the Commission's jurisdiction.[16]

The New York State Commission Against Discrimination has prosecuted the following cases among others. *Valentine* v. *Brotherhood of Railway and Steamship Clerks*, Lodge 56, 1952 Comm. Annual Report, p. 34; *Ruconich* v. *El Al Israel Air Lines*, 1953 Comm. Annual Report, p. 40; *Byams* v. *New York, New Haven & Hartford Railroad*, 1956 Comm. Annual Report, p. 57; *Inv. 831-59, Pan American World Airways*, 1960 Comm. Annual Report, p. 90; *Rosa Daly* v. *British Overseas Airways Corp.*, 1960 Comm. Annual Report, p. 91; *Patricia Banks* v. *Capital Air Lines*, 1960 Comm. Annual Report, p. 95.

The Oregon Bureau of Labor has entertained two complaints against an interstate air line.[17]

The Pennsylvania Human Relations Commission has exercised jurisdiction over seven complaints filed against several interstate air lines.[18]

The Washington State Board Against Discrimination has taken jurisdiction in 13 cases involving interstate carriers. Three were against the Northern Pacific Railroad, one was against the Great Northern Railway Company, six against United Air Lines, two against the Greyhound Bus Company, and the last was against an interstate trucking company.[19]

16. Information obtained from Edward N. Hodges, III, Executive Director, Michigan Fair Employment Practices Commission.

17. Letter of January 9, 1963 from Mark A. Smith, Administrator, Civil Rights Division, Oregon Bureau of Labor.

18. Letter of January 10, 1963 from Elliott M. Shirk, Executive Director, Pennsylvania Human Relations Commission. Mr. Shirk's letter notes that "our law prevents us from giving specific information as to name of complainant or respondent and case docket numbers."

19. Letter of January 9, 1963 from Malcolm B. Higgins, Executive Secretary, Washington State Board Against Discrimination.

The Wisconsin Fair Employment Practices Division of the Industrial Commission has entertained jurisdiction over several complaints against interstate railroads.[20]

Congress has accepted application to interstate carriers not only of fair employment legislation but also of other laws prohibiting discrimination. These include laws dealing with discrimination against passengers—a matter directly affecting operation of individual carrier units.

No less than 28 states and the District of Columbia have enacted laws prohibiting discrimination by enterprises, variously defined, that solicit the patronage of the general public. The constitutionality of such laws is well-established.[21]

The first of these, which was enacted in Massachusetts in 1865, specifically applied to any "public conveyance."[22] Of the 29 laws now in effect, 22 expressly apply to common carriers[23] and four are cast in terms broad enough to in-

---

20. Information obtained from Virginia Heubner, Director, Wisconsin Fair Employment Practices Division.

21. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100 (1953); *Darius* v. *Apostolos*, 68 Colo. 323, 190 Pac. 510 (1920); *Crosswaith* v. *Bergin*, 95 Colo. 241, 35 P. 2d 848 (1934); *Baylies* v. *Curry*, 128 Ill. 287, 21 N. E. 595 (1889); *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667 (1926); *Bolden* v. *Grand Rapids Operating Corp.*, 239 Mich. 318, 214 N. W. 241 (1927); *Brown* v. *J. H. Bell Co.*, 146 Iowa 89, 123 N. W. 231 (1910); *Rhone* v. *Loomis*, 74 Minn. 200, 77 N. W. 31 (1898); *Marshall* v. *Kansas City*, 355 S. W. 2d 877 (Mo., 1962); *Messenger* v. *State*, 25 Neb. 674; 41 N. W. 638 (1889); *People* v. *King*, 110 N. Y. 414, 18 N. E. 245 (1888); *Commission* v. *George*, 61 Pa. Super. 412 (1915).

22. Gen. Stat. (1860-66 Supp.), Ch. 277.

23. *Alaska* Com. Laws, Sec. 20-1-3, "Transportation companies"; *Cal.* Civ. Code, Sec. 51, "Public conveyances and all other places of public accommodation or amusement"; *Colo.* Rev. Stats., Sec. 25-2-3, "Public conveyances on land or water"; *Idaho* Gen. L. Ann. (1961 Supp.), Ch. 73, Sec. 18-7302(e), "Public conveyance

clude common carriers.[24] The remaining three appear to exclude interstate carriers.[25]

---

or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles"; *Ill.* Stats. Ann., Ch. 38, Sec. 125, "Railroads, omnibuses, stages, street cars, boats, funeral hearses, and public conveyances on land and water"; *Ind.* Stat. Ann., Sec. 10-901, "Public conveyances on land and water"; *Iowa* Code, Sec. 735.1, "Public conveyances"; *Maine* Rev. Stats., Ch. 137, Sec. 50 (1954), "Public conveyances on land or water"; *Mass.* Ann. Law, Ch. 272, Sec. 92A, "A carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto"; *Mich.* Stats. Ann., Sec. 28.343, "Public conveyances on land and water"; *Minn.* Stats. Ann., Sec. 327.09, "Public conveyances"; *Neb.* Rev. Stats., Sec. 20-101 (1943), "Public conveyances"; *N. H.* Rev. Stats. Ann., Ch. 354, Sec. 2, "Public conveyance on land or water"; *N. J.* Stats. Ann., Sec. 10:1-5, "Any garage, any public conveyance operated on land or water and stations and terminals thereof"; *N. M.* Stats. Ann., Sec. 49-8-5, "All public conveyances operated on land, water or in the air as well as the stations and terminals thereof"; *N. Y.* Civ. Rights Law, Sec. 40, "Garages, all public conveyances operated on land or water, as well as the stations and terminals thereof"; *N. D.* Century Code Ann. (1961 Supp.), Sec. 12-22-30, "Public conveyances"; *Ohio* Rev. Code, Sec. 2901, 35, "Public conveyance by air, land or water"; *Pa.* Stats. Ann., Tit. 18, Sec. 4654 (1945), "Garages, and all public conveyances operated on land or water as well as the stations and terminals thereof"; *R. I.* Gen. Laws, Sec. 11-24-3, "All public conveyances, operated on land, water or in the air as well as the stations and terminals thereof"; *Wash.* Rev. Code, Sec. 49.60.040 (1956), "Public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles"; *Wis.* Stats. Ann., Sec. 942.04 (1956), "Public conveyances."

24. *Conn.* Rev. Stat., Sec. 53-35, refers to "every place of public accommodation," and place of public accommodation is defined as "any establishment * * * which caters or offers its services or facilities or goods to the general public * * *"; *Mont.* Rev. Code, Sec. 64-211 (1957 Supp.), "Public accommodation or amusement"; *Vt.* Stats. Ann., Sec. 1451, "Any establishment which caters or offers its services or facilities or goods to the general public"; *Wyo.* Stats. Ann., Sec. 6-83.1, "All accommodations * * * public in nature, or which invite the patronage of the public."

25. *D. C.* Code 33-604-607, applies only to eating places; *Kan.* Gen. Stats. Ann., Sec. 21-2424 (1949), applies to any steamboat, railroad, stage coach, omnibus, streetcar, or any means of public carriage for persons or freight *within the state*; *Ore.* Rev. Stats., Sec. 30.670.

B. No Federal statute precludes state regulation of this area.

The Colorado Supreme Court, in its decision in this case, did not consider the question of pre-emption but confined its decision to the argument, discussed in Points II and III below, that the challenged state law constituted a burden on interstate commerce. However, the trial court, whose decision the state Supreme Court commented on favorably, considered the pre-emption argument in detail and concluded that certain federal statutes indicated a clear Congressional intention to occupy the field of air transportation so completely as to exclude state regulation of any kind.

This argument has two aspects: first, that the Federal Government has specifically dealt with racial discrimination in employment by interstate air carriers, and, second, that, even if it has not, its regulation of such carriers is so extensive as to bar any state regulation even of matters not covered by federal statutes. We submit that neither argument is supported by the decisions of this Court.

The trial court held that employment discrimination by interstate air carriers is prohibited by the Railway Labor Act (45 U. S. C. Sec. 151, *et seq.*, 181 *et seq.*) as well as the Civil Aeronautics Act. 49 U. S. C. Secs. 1301 *et seq.*, formerly 49 U. S. C. Secs. 401 *et seq.*

The Railway Labor Act and the decisions of this Court thereunder deal with discrimination by unions. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952); *Conley* v. *Gibson*, 355 U. S. 41 (1957). No agency of the Federal Government administering the Railway Labor Act had suggested or taken any

action establishing that the statute deals with the discriminatory practice reached here under the Colorado law, i.e., discrimination by an employer independent of action by a union.

The provision in the Civil Aeronautics Act primarily relied on is 49 U. S. C. Sec. 1374(b) (formerly Sec. 484(b)), which provides as follows:

> (b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The undersigned organizations do not, of course, take the position that this section cannot be invoked to prevent employment discrimination by air carriers. However, we are compelled to note that it has never been so interpreted or applied and its application to this area is at least an unresolved issue. This Court could hardly nullify application of the Colorado law to respondent on the ground of preemption without resolving that open question. Since there is at least doubt on this point, this Court, without resolving the issue, should uphold the state statute since, as this Court has repeatedly held, "Congress * * * will not be deemed to have intended to strike down a statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested." *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766 (1945), and cases there cited.

If employment discrimination by interstate air carriers is not prohibited by federal legislation, the remaining question is whether Congress has so occupied the general field as to bar state regulation of that specific subject. We submit that the lower court's affirmative answer to that question is unsound. If it were sound, all state laws dealing in any way with air, railroad, motor or other forms of interstate transportation would be invalidated.

Surely, no aspect of our economy is so thoroughly regulated by Congress as the interstate railroads. Yet this Court has upheld even such detailed state regulation of rail operations as statutes requiring full crews on trains, *Chicago, R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453 (1911); *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249 (1931). In referring to these statutes as an example of laws not barred by the Congressional power over interstate commerce, this Court has described them as "statutes dealing with employment of labor" (*Morgan* v. *Virginia*, 328 U. S. 373, 379n (1946)), a description plainly applicable to the statute here involved.

The courts below apparently believed that federal regulation of some aspects of interstate transportation by air precludes state regulation of all other aspects. Their error is revealed by this Court's decision in *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280 (1914), where a similar argument was rejected even within the narrow area of safety regulations. It was there argued that a state statute, based on safety considerations, regulating the strength of locomotive headlights was barred by federal laws "relating to power driving-wheel brakes for locomotives, grabirons, automatic couplers and height of drawbars," as well as a number of other statutes and regulations dealing with

safety (234 U. S. at 293). Justice (later Chief Justice) Hughes, speaking for a unanimous Court, disposed of this contention briefly, saying "But it is manifest that none of these acts provide regulations *for locomotive headlights*" (*ibid.*; emphasis supplied).

Finally, even if it appears that the Federal Government has regulated the very conduct here involved, that fact by itself would not be decisive. In *California* v. *Zook*, 336 U. S. 725 (1949), this Court expressly rejected the view that the mere fact of parallel federal and state regulation nullifies the latter. It held that there must be some additional showing of Congressional intent to exclude state action. Accordingly, the states have duplicated federal regulation in interstate transportation in a number of ways, one of which is revealed in the Colorado statute referred to in the decision below, which makes it a state crime to operate aircraft without the appropriate federal license and registration. Colo. Rev. Stat., Sec. 5-1-2. Although the court below cited this statute as showing state deferment to federal regulation, it actually shows concurrent regulation by the state and Federal Governments to enforce a common policy.

We submit that the decisions of this Court establish that there is ample room for state regulation of employment discrimination by interstate air carriers. Nothing in the pre-emption doctrine requires the conclusion that Congress has barred state regulation of employment discrimination because it has found it necessary to regulate other unrelated aspects of air transportation.

II

The Colorado fair employment statute places no burden on interstate commerce.

Independent of the issue of pre-emption, it can be argued that the Colorado statute may not be applied to respondent if such application would be "burdensome • • • on interstate commerce" (*Huron* case, *supra*, 362 U. S. at 443). We submit that there is no basis for arguing, and that respondent has not shown, that a fair employment law places a burden on the employers to which it applies or that there is any danger that air carriers will be subjected to conflicting regulations.

A. The non-discrimination requirement places no burden on employers.

At the outset, it should be noted that a burden on interstate commerce will not be found lightly. In the cases in which this Court has held state laws unduly burdensome, there has been an impressive record spelling out the manner in which the statute made operation of the carriers' facilities more difficult or at least more expensive.

Thus, in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945), this Court discussed in detail the effect of a state statute limiting the length of railroad trains (325 U. S. at 771-3). It noted that the statute had an "admittedly adverse effect on the operation of interstate trains" (*id.* at 764) and concluded that it placed a "serious burden" on railroad operations (*id.* at 773). See also *South Covington Ry.* v. *Covington*, 235 U. S. 537, 547 (1915); *Illinois Cent.*

R. Co. v. *State of Illinois*, 163 U. S. 142, 153 (1896); *Cleveland, etc. Ry. Co.* v. *People of State of Illinois*, 177 U. S. 514, 521 (1900); *Mississippi Railroad Comm.* v. *Illinois Central R. R. Co.*, 203 U. S. 335, 345, 346 (1906).

No such showing is made here. Respondent has not shown that compliance with the fair employment law would make the hiring of personnel more difficult. Plainly, it cannot, since the purpose and effect of such legislation is to remove a restraint on the employment process. Because of the law, respondent and all competing carriers have a larger source of manpower supply, free of artificial limitations based on race.

This is no longer a matter of speculation. As we have noted, fair employment laws have been in effect for more than 17 years. It is possible to consider their operation on the basis of actual experience. If they were burdensome to the employers affected, respondent would be able to produce evidence to that effect. It has not done so.

The fact is, on the contrary, that employers have operated freely and successfully in fair employment states. Many employers that have conformed to the requirements of the law have been outspoken in its support.

Early in 1950, *Business Week* asked employers in New Jersey, Connecticut and New York their views of the fair employment laws in their states. The magazine found that, while some employers still believed the laws unnecessary, even those employers who had opposed them were no longer actively hostile. All eleven firms surveyed reported to *Business Week* that the laws did not interfere with their right to hire the most competent employees they could find, and concluded that the laws were functioning without any serious problems. (*Business Week*, Feb. 25, 1950)

Even more favorable testimony was produced by the commission enforcing the New York State law in a statement to a Subcommittee of the United States Senate Committee on Labor and Public Welfare. (Statement of the New York State Commission Against Discrimination before the U. S. Senate Subcommittee on Labor and Labor Management Relations, April 16, 1952, pp. 11-12.) A "representative of an association of retail merchants" testified that the law had simple requirements that imposed no hardship upon an employer. A "financial district observer" noted that the law had had "a fine effect upon the employment practices of banks and brokerage houses * * *". A representative of a "public utility company" thanked the New York agency for its fair consideration of the company's employment practices and concluded that the agency's work had been of "definite value to us in appraising our personnel methods and practices."

The New York State Commission Against Discrimination (now called the New York State Commission for Human Rights) has also publicized statements from individual employers on the impact of the state anti-discrimination law upon them. The executive vice president of the New York Board of Trade said:

> I am one of those who was against the anti-discrimination law when it was first introduced and worked hard to prevent its passage. Now after six years of operation particularly as it is so ably enforced, I find that our fears have not been realized, but much more genuine progress has been achieved.

The executive vice-president of the Commerce and Industry Association of New York State, in March 1953, said:

> It is our observation that the New York State Anti-Discrimination program has in general functioned and has met with a wide degree of acceptance considering the sensitive area in which it operates. The State Commission Against Discrimination has approached its task with intelligence and there has been due emphasis on the role of education in effecting the purposes of the program. We are aware of no concerted employer opposition to the law and only spotty complaints have come to our attention. There are many illustrations of employer endorsement of and cooperation with the program.

The Rhode Island Commission for Fair Employment Practices has stated that many employers on the basis of their experience have been convinced of the groundlessness of their early fears of anti-discrimination laws and the Fair Employment Practices Commissions of Philadelphia and Minneapolis have also published reports confirming the view that employers believe now that fair employment practices acts have not only not burdened them but have in fact benefited them. (Reported in Staff Report to the Subcommittee on Labor and Labor Management Relations of the U. S. Senate, Committee Print, 82nd Cong., 2d Sess., p. 19 (1952). See also H. Rep. No. 1370, 87th Cong., 2d Sess., p. 5 (1962)).

B. There is no possibility of burdensome conflicting requirements.

Respondent argues, however, that its operations may be burdened by the Colorado law because it may be subjected to conflicting regulations in the various states in which it operates. In this connection, it relies on the well-established principle that state regulations may be found

to be unduly burdensome and hence unconstitutional if they result in inconsistency "in matters where uniformity is necessary * * *." *Morgan* v. *Virginia*, 328 U. S. 373, 377 (1946). That argument fails here because respondent cannot show either a possibility of inconsistency or a need for uniformity.

As we have noted above, fair employment laws applicable to common carriers are now in effect in 22 states. These states include 63.1% of the total population of the nation and most of its industrial areas.[26] More important, there are no state laws requiring discrimination; and it is now entirely clear that no state can constitutionally adopt a law requiring discrimination by private parties. See, *e.g.*, *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Gayle* v. *Browder*, 352 U. S. 903 (1962), affirming 142 F. Supp. 707 (M. D., Ala., 1956).

Hence, this case does not reveal the vice that invalidated state regulation of interstate or foreign commerce in other cases, namely, that, if the regulations were sustained, other states could with equal right impose conflicting and diverse regulations that would burden interstate carriers. The Constitution itself, through the Equal Protection Clause, insures against a state requirement of discrimination in employment on account of race. The Colorado requirement of fair employment carries out the constitutional "pledge of the protection of equal laws." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350 (1938). It cannot, therefore, be regarded as imposing an undue burden on interstate commerce.

---

26. The population of the twenty-two states in the 1960 census (The World Almanac, 1960, p. 255) was 113,232,789. The total United States population was 179,323,175.

Our contention that state regulation of interstate commerce may be held to be free of burdensome effects, in view of the restrictive effects of other provisions of the Constitution, is not new. The interplay between the Commerce Clause and the Fourteenth Amendment has been an important factor in sustaining state regulation of interstate commerce in the area of taxation. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940); *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (1944); *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340 (1954). In determining whether the validation of a state tax would subject interstate commerce to a risk of undue cumulative tax burdens, this Court has considered the effect of the Due Process Clause in restricting the taxing powers of other states. A basic consideration in the sustaining of certain state tax levies affecting interstate commerce has been the inability of other states to tax the same transaction, not because of the Commerce Clause, but because of the restrictions on extraterritorial taxation imposed on the states by the Due Process Clause.

This interrelation between the Commerce Clause and the Due Process Clause was illuminated in *International Harvester Co.* v. *Department of Treasury et al., supra;* and *Freeman* v. *Hewit*, 329 U. S. 249 (1946). In the latter case, Justice Rutledge said (at p. 271):

> Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements. *The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.* (Our emphasis; footnote omitted.)

See also McNamara, *Jurisdictional and Commerce Problems,* 8 Law and Contemporary Problems 482 (1941).

The principle applied in the tax cases affecting interstate commerce is, we believe, applicable to the instant case. In the cases referred to, the Due Process Clause made it impossible for other states to add to the burden of the tax on the transaction under attack, with the result that the levies were sustained. So, here, the Equal Protection Clause precludes diverse or conflicting state action respecting employment. Consequently, as in the tax cases, the regulation is valid, for in the absence of the risk of an undue burden on commerce, the statute is a proper exercise of the state's police power.

Finally, respondent has not shown that any burden will be placed on its operation by application of inconsistent laws regarding employment. The Colorado statute prohibits discrimination in employment and does not affect in any way the operation of respondent's planes. The contract of employment is made at one place and, of course, is subject to the law of that place and only that place. Once hired, an employee can be sent to any part of the country as respondent sees fit.

There is no need here, as there was in *Morgan, supra,* and in *Hall* v. *De Cuir,* 95 U. S. 485 (1877), for the carrier to make changes in its transportation units each time they cross a state line. There is no need for the crew of an interstate plane to interrupt a trip in order to comply with changed rules. In short, there is no burden, undue or otherwise.

Respondent and the court below placed their chief reliance on this Court's decisions in *Morgan* and *Hall.* We submit that those cases are clearly distinguishable since

they deal with operations rather than employment. There is a manifest difference, not discussed by the court below, between what happens day-to-day in the operation of planes and trains and what happens when a carrier takes on personnel at its home office. In one case, conflicting regulations directly affect the operation of the transportation units; they compel extra work on the part of the operating crews and sometimes the use of extra equipment and the halting of trips at state lines. No such problems are posed by inconsistent regulation of employment; no other problems are plausibly suggested. No showing has or can be made of the "transportation difficulties" that were decisive in *Morgan*. 328 U. S. at 385-6.

Respondent has tried to make the rulings in *Morgan* and *Hall* fit a situation to which they have no logical application. It has attempted to create the impression that those cases dealt generally with the whole problem of racial discrimination in interstate transportation in all its forms. In fact, however, they dealt at most with the handling of passengers in interstate transportation units. Neither their rationale nor their factual basis applies to the hiring of employees.

Moreover, in *Morgan*, there was not only the possibility but the actual fact of inconsistent regulations, as this Court took pains to show (328 U. S. at 381-383). The possibility of inconsistent regulations also existed in the *Hall* case at the time it was decided. But whatever validity *Hall* may have had up to 1954, it is now completely undermined by the decisions of this Court condemning state segregation laws, as we have shown above. We therefore respectfully suggest that this case provides an appropriate occasion for overruling *Hall* expressly, at least to the extent that it

holds that a law prohibiting discrimination may obstruct interstate commerce. There is no basis in law or practical experience for a holding that a law requiring equal treatment is burdensome. Such a holding, we believe, is fundamentally at odds with the equalitarian concepts of the Constitution. It might as well be argued that "the mandates of liberty and equality that bind officials everywhere" (*Nixon* v. *Condon*, 286 U. S. 73, 88 (1932)) place a "burden" on government—that the prohibition of racial segregation in public schools is a "burden" on education.

Since the rationale of *Hall* v. *DeCuir* has been destroyed, it is time that the ambiguity caused by its continuing vitality be eliminated by this Court.

III

Accommodation of the competing demands of the state and national interests requires a decision upholding the validity of the Colorado statute.

If it is assumed, contrary to what was said in the previous point, that the Colorado fair employment law does place some burden on interstate commerce, the national interest in the elimination of that burden must be weighed against the state interest sought to be served by the statute. Thus, in *Southern Pacific*, *supra*, this Court measured "the relative weights of the state and national interests. * * *" (325 U. S. at 770). As already noted, it found first that the challenged state law placed a substantial, palpable burden on interstate carriers. It then went on to consider in detail the evidence relevant to the state need served by the statute and found that the statute, "viewed as a safety measure, affords at most slight and dubious advantage. * * *" (325

U. S. at 779). The public purpose served by the Colorado fair employment law, we submit, is far more substantial.

Both the existence and the harmful effects of discrimination in employment against minority groups have been fully documented. See, *e.g.*, Myrdal, *An American Dilemma*, Chaps. 9-19 (1944); Weaver, *Negro Labor, A National Problem*, pp. 16-97 (1946); Emerson & Haber, *Political and Civil Rights in the United States*, Vol. II, pp. 1422-5 (1958). The first wartime executive order dealing with discrimination by defense contractors, issued by President Roosevelt in 1941, found that "available and needed workers have been barred from employment in industries engaged in defense production solely because of consideration of race, creed, color, or national origin, to the detriment of workers' morale and of national unity." Executive Order No. 8802, 6 Fed. Reg. 3109 (1941). The Fair Employment Practice Committee established under that order found extensive evidence of discrimination. Fair Employment Practice Committee, *First Report*, pp. 85-101 (1945); *Final Report*, pp. 41-97 (1947).

It was also during the period of World War II that the New York State Legislature established a Temporary Commission Against Discrimination, headed by State Senator Irving M. Ives, later a United States Senator, to investigate this pressing problem. On the basis of extended hearings, the Temporary Commission reached the following conclusion (*Report*, Legislative Document (1945) No. 6, at pp. 48-49):

> Discrimination in opportunity for employment is the most injurious and un-American of all the forms of discrimination. To deprive any person of the chance to make a living is to violate one of the most fundamental of human rights. Moreover, such discrimination is op-

> posed to every sound principle of public policy and makes against loyalty to democratic institutions. * * * Social injustice always balances its books with red ink.

Accordingly, the Commission recommended the adoption of a state law prohibiting discrimination in employment and the establishment of an administrative agency to enforce its provisions. In the same year that the Commission issued its Report, the New York State Legislature adopted its fair employment law, based on the proposed bill submitted by the Temporary Commission (Report, pp. 77-82). The Legislature expressly found, in that statute, that "practices of discrimination * * * because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state." New York Exec. Law, Sec. 290.

Similar findings have been made by many of the other states that have adopted fair employment legislation.[27] In one of the most recent statutes, the Illinois Legislature found that "* * * denial of equal employment opportunity because of race, color, religion, national origin or ancestry with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies, resulting in grave injury to the public safety, health and welfare."

---

27. See the Alaska, California, Kansas, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington and Wisconsin statutes cited in notes 1 to 9, *supra*.

Federal government agencies have reached the same conclusion. The President's Committee on Civil Rights found extensive evidence of discrimination in employment and its evil effects in its 1947 Report, *To Secure These Rights*, pp. 53-62 (1947). Thirteen years later, the United States Commission on Civil Rights issued a 246-page report dealing with this problem. *1961 Report, Book 3, "Employment."*

The widespread existence of employment discrimination has also been found by Congressional committees studying the subject. Sen. Rep. No. 2,080, 82nd Cong. 2d Sess., pp. 3-4 (1952); H. Rep. No. 1,165, 81st Cong. 1st Sess., pp. 2-8 (1949); H. Rep. No. 951, 80th Cong. 2d Sess., pp. 2-6 (1948); Sen. Rep. No. 290, 79th Cong. 1st Sess., p. 3 (1945); Sen. Rep. No. 1,109, 79th Cong. 1st Sess., pp. 2-3 (1945). Most recently, the House Committee on Education and Labor, in a report on a proposed federal fair employment law, stated (H. Rep. No. 1370, 87th Cong. 2d Sess. pp. 1, 2 (1962)):

> The conclusion inescapably to be drawn from 98 witnesses in 12 days of hearings, held in various sections of the country as well as in Washington, and from many statements filed without oral testimony, is that in all likelihood fully 50 percent of the people of the United States in search of employment suffer some kind of job opportunity discrimination because of their race, religion, color, national origin, ancestry, or age. It should be made clear that the evidence poured in from all parts of the Nation—East, West, North, and South. • • •
>
> • • •
>
> Arbitrary denial of equal employment opportunity unquestionably contributes to our current staggering welfare assistance costs • • •

Fair employment legislation of the kind adopted in Colorado is a reasonable and effective way of dealing with this well-documented evil. In state after state that has adopted such legislation, its beneficial effect has been realized. Thus, in ten of the states having a number of years of experience with fair employment laws, the State Advisory Committees to the United States Commission on Civil Rights reported in 1961 that beneficial effects had been achieved. United States Civil Rights Commission, *Fifty States Report*, pp. 56, 80, 287, 297, 405-8, 429-31, 530, 545, 556-7, 631-4 (1961). See also Konvitz and Leskes, *A Century of Civil Rights*, pp. 222-224 (1961).

We submit that the Colorado Legislature could reasonably conclude that employment discrimination based on race, religion and national origin exists, that it has harmful effects of the kind normally dealt with under the police power and that the legislation here challenged was a reasonable and effective method of dealing with it. Hence, the "state interest" is substantial. The "national interest", in barring state laws prohibiting employment discrimination by interstate carriers, as we have seen, is at best minimal and, in fact, we believe, non-existent. Indeed, constitutional principles as well as practical considerations compel the conclusion that the national interest is advanced rather than hindered by elimination of discrimination by interstate air carriers. There is therefore no basis for holding that preservation of the federal-state relationship requires the result reached below.

Conclusion

Fair employment laws are a conventional and widely accepted exercise of the police power of the states. They have been applied to interstate carriers for over a decade without hampering interstate transportation. No national interest, no constitutional principle, no decision of this Court requires that Continental Air Lines be given a license to operate in defiance of the declared policy of Colorado, under which the state has "put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt." Frankfurter, J., concurring in *Railway Mail Association* v. *Corsi, supra,* 326 U. S. at 98. The decision of the Colorado Supreme Court should therefore be reversed.

Respectfully submitted,

JOSEPH B. ROBISON,
Attorney for
American Jewish Congress,
15 East 84th Street,
New York 28, New York.

MELVIN L. WULF,
Attorney for
American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York.

JACK GREENBERG,
Attorney for
NAACP Legal Defense and
Educational Fund, Inc.,
10 Columbus Circle,
New York 19, New York.

Amici Curiae

January, 1963